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OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable George H. Sheppard  
Comptroller of Public Accounts  
Austin, Texas

Dear Sir:

Opinion No. 0-3373

Re: Will nurseries operating in  
the open without a building  
of any kind be subject to  
the chain store tax?

You have requested the opinion of this Department  
on the facts set out in your letter as follows:

"On October 21, 1940, we requested from  
you an opinion in regards to whether or not nur-  
series were subject to the store tax. We gave  
you a statement of facts regarding the operation  
of these nurseries and, in turn, you wrote an  
opinion dated November 4, 1940.

"Under the facts in that opinion the es-  
tablishment in question is a building in which  
a number of trees, plants, and shrubs are kept  
and exhibited to the public. The nurseries have  
advised me that according to your opinion unless  
they have a building from which sales of mer-  
chandise are made they will not be subject to  
the tax.

"I will thank you if you will please advise  
me if nurseries operating out in the open with-  
out a building of any kind will be subject to  
the store tax."

In opinion No. 0-2776 the establishment in question  
was a building in which a number of trees, plants and shrubs,  
etc., were kept and exhibited for sale to the public. Under  
such facts this Department ruled in that opinion that such  
establishment was subject to the Texas Chain Store Tax.

We again call your attention to Section 7 of the  
Chain Store Tax Act, Article 1111d, Vernon's Annotated Penal

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Code, which reads as follows:

"Sec. 7. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, at retail or wholesale."

We also again refer you to the interpretation of the above quoted section by the Commission of Appeals in the case of *Hurt v. Cooper*, 110 S. W. (2d) 896, where the court states as follows:

"The statute having defined the word, we are not concerned with its usual meaning. Under that definition a mercantile establishment at which goods, wares, or merchandise of any kind, except those exempted, are sold is a store and is taxable as such, and this even though it may also be a distributing point." (Emphasis ours)

Based on the above this Department ruled in said opinion 0-2776, as follows:

"It is the opinion of this department that a place of business established for the sale of trees, plants, etc. from which place of business such commodities are sold is a "store" as that term is defined in the Texas Chain Store Act, supra, and such place of business is subject to the payment of the chain store tax."

As we understand your question you submit a situation where an establishment is maintained under the manner discussed in the above quoted opinion with the exception that the establishment is not a building but rather the business is conducted out in the open. The term "mercantile establishment" is defined in 27 Words and Phrases 65, as follows:

"The word 'establishment' means an institution, place, building, or location. The word

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'mercantile' in its ordinary acceptance means pertaining to the business of merchants and is concerned with trade or buying and selling of merchandise. The meaning of the word 'establishment' is greatly restricted when used following the word 'mercantile', and the expression 'mercantile establishment' refers to an institution of mercantile business or a place, building, or location where mercantile business or the buying or selling of merchandise is conducted or engaged in. *Veazey Drug Co. v. Bruza*, 37 F. 2d 294, 169 Okl. 418."

As stated in the above definition the term "establishment" would include either an institution, place, building or location. It is our opinion therefore that an establishment operating as discussed herein from an open lot rather than a building would still be subject to the Texas Chain Store Tax. We call your attention further to the fact that numerous businesses that are conducted in the open have been paying the chain store tax since its enactment. For example automobile dealers that maintain only open lots for the sale of second-hand cars have been paying the chain store tax on such lots. The test as we see it is as follows:

Where you have an established place of business for the sale of goods, wares or merchandise of any kind, whether the same be a building or not, the same would be subject to the Texas Chain Store Tax.

It is the opinion of this Department therefore that under the facts you submit the establishment in question is subject to the Texas Chain Store Tax.

Yours very truly

APPROVED MAY 14, 1941

ATTORNEY GENERAL OF TEXAS

*Goos Allen*  
FIRST ASSISTANT  
ATTORNEY GENERAL

By

*Billy Goldberg*  
Billy Goldberg  
Assistant

BG:MP

